WT Docket No. 05-194

COMMENT RE PETITION FOR DECLARATORY RULING FILED BY CTIA REGARDING WHETHER EARLY TERMINATION FEES ARE "RATES CHARGED" WITHIN 47 U.S.C. SECTION 332(c)(3)(A)

In accord with Release DA 05-1389 setting forth a Public Notice calling for comments in Docket No. 05-194, and the procedures of the Commission, this Comment is filed concerning the above-captioned Petition.

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Edwards, et al. v. Triton PCS Operating Company, .L.C.,d/b/a/ SunCom, a Member of the AT&T Wireless Network,
SOUTH CAROLINA COURT OF COMMON PLEAS, FIFTEENTH JUDICIAL CIRCUIT (COUNTY OF HORRY) CASE NO. 02-CP-26-3539

June 10, 2005

SUMMARY

1. The Commission has segregated into two separate Dockets, No. 05-193 and No. 05-194, two pending petitions for Declaratory Rulings which are very differently situated.

Docket 05-194 focuses upon whether the "application of state law by a court or other tribunal to invalidate, modify, or condition the use or enforcement of early termination fees based, in whole or in part, upon an assessment of reasonableness, fairness, or cost-basis of the early termination fee, or to prohibit the use of early termination fees as unlawful liquidated damages or penalties, constitutes prohibited rate regulation preempted by Section 332(c)(3)(A)." FCC Release 05-1389, May 18, 2005.

Docket 05-193 deals with cross-petitions for Declaratory Rulings relating specifically to claims in one particular lawsuit that an early-termination fee has been imposed by a carrier after the expiration of the stated contract period, without basis under the parties' contract and in violation of state law.

The Commission should maintain this distinction in any declaratory rulings it undertakes because the more narrow issues in Docket 05-193 do not involve claims that early-termination fees are invalid, that courts can or should modify or condition early-termination fees, that either the use or the enforcement of early termination fees should be foreclosed – or even limited – and this Docket does not relate to claims turning in any way upon an assessment of reasonableness, fairness, or cost-basis of the early termination fee, or the use of early-termination fees as unlawful liquidated damages or penalties.

Hence the issues involved in Docket 05-193 should be separately addressed.

2. The decision whether a federal statute preempts state law remedies relating to consumer contracts is properly decided by the state courts where the actions are pending. The Commission has so held, repeatedly.

Hence rulings on the pending applications should be deferred to the courts with jurisdiction over the underlying litigations.

3. If the Commission reaches the merits, under the standard which must be applied in assessing preemption of state law claims by a federal statute, only clear and unequivocal direction by Congress ousting the operation of the state remedy will be sufficient to effect preemption. That clear legislative statement is simply not present here and the missing language cannot be supplied by interpretation, policy or inference.

Section 332(c)(3)(A) of the Communications Act is on its face directed at limiting units of state and local governments from regulating entry into the market for providing cellular telephone services, and barring state and local governments from setting telephone service rates. The statute does not address private damage claims concerning contract provisions between the consumer and the telephone service provider, and thus preemption is not clearly provided for in the statute. That ends the inquiry.

The governing statute does not define the term "rates," though the focus on time and calling charges is apparent from the context and the legislative history. More importantly, under standards set by the United States Supreme Court, where a statute leaves a term un-defined, and only one of the interpretations of that term causes preemption, it is mandatory that the outcome is a finding that there is no preemption. The United States Supreme Court has applied this standard directly to Communications Act provisions in current decisions, and that standard is applicable here.

In addition, the savings clauses of the Communications Act, one of which is embedded in the very same sentence forbidding state and local governmental regulation of market entry or pricing, document that no implied preemption is intended. Legislative history confirms this reading. Both the specific and the general "savings clauses" demonstrate that there is no preemption here.

Fundamentally, the preemption provision in § 332 describes activities most naturally associated with the exercise of state power (franchising approved carriers and engaging in state utility regulation as in decades past), not with the resolution of private contract disputes. It cannot reasonably be read to displace (or to prevent the effectuation of) competitive, market-driven choices embodied in private contracts. To the extent that common-law claims for breach of contract are based on allegations of an agreement actually entered into by the carrier and a customer, as distinguished from state laws or policies external to any agreement, the statute leaves those claims intact. Effectuating private contracts also is consistent with the Act's deregulatory purpose, because contracts do not substitute state policy decisions for the telephone service companies' business judgments, but are rather a key component of the deregulated market that the amended Act was designed to encourage.

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I

THE COMMISSION SHOULD ADDRESS DOCKETS No. 05-193 AND No. 05-194 SEPARATELY

The Commission has segregated into two separate Dockets, No. 05-193 and No. 05-194 pending petitions for Declaratory Rulings which are very differently situated.

Docket No. 05-194 focuses upon the viability of the "application of state law by a court or other tribunal to invalidate, modify, or condition the use or enforcement of early termination fees based, in whole or in part, upon an assessment of reasonableness, fairness, or cost-basis of the early termination fee, or to prohibit the use of early termination fees as unlawful liquidated damages or penalties," and whether such enforcement of such state claims "constitutes prohibited rate regulation preempted by Section 332(c)(3)(A)." FCC Release 05-1389, May 18, 2005.

In contrast, Docket No. 05-193 deals with cross-petitions for Declaratory Rulings relating specifically to claims in a particular lawsuit that an early-termination fee has been imposed by a carrier after the expiration of the stated contract period, without basis under the parties' contract and in violation of state law.

When CTIA filed the petition now docketed in No. 05-194 it stressed throughout the petition that the various claims in courts of several states which motivated the Petition did not include the sorts of allegations pending in the *Edwards* litigation, which led to Docket No. 05-193. CTIA's petition focuses on other litigations, and on assertions of the right to bar or block the creation or enforcement of early-termination fees ab initio.

To be distinguished from those decisions are cases seeking relief which simply implements the parties' contract. CTIA makes this clear at p. 20 of its Petition, noting that claims which "ask state courts merely to compare a carrier's 'promise versus performance' " are not the focus of Docket No. 05-194. CTIA cites examples of authority (id. at n. 54) demonstrating that claims relating to compliance "with the terms of the contract may be appropriately reviewable in state court because the court need not inquire into the reasonableness of the charges." Id., citing AT&T Corp. v. Federal Communications Commission, 349 F.3d 692, 701 (D.C. Cir. 2003); and Union Ink Co. v. AT&T Corp., 801 A.2d 361, 376 (N.J. Super. Ct. App. Div. 2002).

The Commission should maintain this distinction in any declaratory rulings it undertakes because the more narrow issues in Docket 05-193 do not involve claims that early-termination fees are invalid, that courts can or should modify or condition early-termination fees, or that the use or the enforcement of early termination fees should be foreclosed – or even limited – and this Docket does not relate to claims turning in any way upon an assessment of reasonableness, fairness, or cost-basis of the early termination fee, or the use of early-termination fees as unlawful liquidated damages or penalties.

Hence the contract-related issues involved in Docket No. 05-193 should be separately addressed. The allegations and issues are distinct, and more limited in that docket, and do not implicate the same issues concerning the fixing of a termination fee as part of a cellular telephone company's charge structure as will be argued in Docket No. 05-194.

Rather, the Edwards case is about SunCom's failure to adhere to its own contract form. The underlying state litigation in that proceeding accepts the validity of an early-cancellation fee, and makes no challenge to the $200 amount prescribed in the form of contract Edwards and other South Carolina residents signed. It makes no challenge to the 12-month period to which the early-termination provision is applicable. Amended Complaint, May 25, 2004 at ¶¶

1-19, filed in FCC Docket 05-193 as Exhibit 1 to the Opposition and Cross-Petition.

Instead, the Edwards case seeks recovery for those instances, which the limited discovery to date in that litigation has already begun to document actually took place in substantial numbers, in which SunCom has imposed the contractual $200 fee when customers continue the service past the initial term, and only terminate the service or switch providers after the stated initial term has been completed, i.e., during a second or subsequent year. This practice is in breach of the contract, and the collection and retention of such amounts when the written contract does not provide for that, is actionable under South Carolina law. Moore v. North American Van Lines, 319 S.C. 446, 448, 462 S.E.2d 275, 276 (1995)(recovery of payments a party previously made, which should not have been required, is proper under the unjust enrichment cause of action). Harper v. McCoy, 276 S.C. 170, 172, 276 S.E.2d 782, 784 (1981) (recovery of amounts credited to one party under a contract where the contract did not warrant that payment or credit is a cause of action for unjust enrichment in South Carolina law). No federal claims are pled in the Edwards case.

This is important for purposes of the preemption analysis in this way: the cellular providers' argument about early-termination fees being part of it's "rate structure" revolves around an asserted need to have a minimum period to recoup costs and make profits by having assurance that the customers will remain in service for the minimum period. For purposes of claims such as those advanced in the Edwards case, it is not necessary for the courts to assess the validity of these assertions by the carrier, or to determine whether the amount of the termination charge set in this or any other company's service contract is reasonable. Instead, given the specific focus of the allegations in the Edwards case, even if it were assumed that the carrier sets its per-minute charges at a lower rate because of a minimum 12-month commitment, the propriety of its incorporation of that provision concerning the minimum term of the contract is simply not involved in this case.

Rather, the Edwards case involves an ongoing commercial relationship between the cellular service provider and the consumers – after the initial term or early-termination period expires – in which the carrier endeavors to deter customers from switching phone service providers in future years by hitting ongoing customers with a $200 fee well after the early-termination period specified in the contract. These are issues addressed in Docket 05-193.

Traditional common-law remedies under South Carolina law will determine the propriety of the carrier's activity in this regard, without treading upon the rates a service provider charges, or its option to condition its contracts upon a minimum period with a built-in early-cancellation fee. Hence there is no rate regulation issue presented by the carefully focused allegations of the present lawsuit.

An example makes the point. In Edwards, the defendant SunCom does not deny that if a customer terminates the service by giving notice in month 12 of the one-year minimum period that the customer does not wish to continue service, no early-termination fee is imposed. This demonstrates that any rate-related balance between the termination fee and the per-minute service rates has been achieved by the end of the stated contract period. Even on the carrier's own rationalization, these concerns are inapplicable when the company engages in a practice of charging these early-termination fees after the stated period has already expired.

II

THE ISSUE WHETHER A FEDERAL STATUTE PREEMPTS STATE LAW CLAIMS IS VESTED IN THE COURTS CONSIDERING THE MERITS OF SUCH CASES, AND SHOULD BE DECIDED AND SUBJECT TO APPELLATE REVIEW IN THE JUDICIAL FORUM

As previously held by the Commission, the generation of a ruling by this body on the question whether specific state-law causes of action are preempted is simply inappropriate.

Plaintiff Edwards in the state litigation which is the subject of the Docket No. 05-193 declaratory proceeding has repeatedly argued to the trial court in the pending state court action that the responsibility for ruling on whether pursuit of the state-law remedies in the pending lawsuit is permissible under § 332 of the Act rests with that court. *This is the position of the Commission itself.*

The Commission has expressly addressed this point: "<u>the determination of whether any particular claim or remedy is consistent with Section 332 must be determined in the first instance by the state trial court based on the specific claims before it</u>." <u>In re Wireless Consumers Alliance, Inc</u>., 15 FCC Rcd. 17021 (2000)("*Wireless Consumers Alliance*"), at 17036 (emphasis added). Plaintiffs have preserved this argument, and maintain before the Commission as they do before the courts of South Carolina, that it is the State Courts which have the responsibility and authority to rule, in the specific case, on the issues presented.

The Commission's Declaratory Ruling in <u>Sprint PCS and AT&T Corp</u>., 17 FCC Rcd 13192 (2002), also made this point. In that proceeding Sprint PCS argued that it had provided a service to AT&T and the parties' contractual relationship did not deal with any right to recover a fee for the service. The Commission noted that in such a context, a claim for recovery under an unjust enrichment theory would could require "require the court to establish a value (i.e., set a rate) for the service provided in the past." Id. at 13198, n. 40. The posture of that proceeding, therefore, was diametrically opposed to the present context. A claim was made in Sprint PCS by the supplier of a service for previously unfixed form of compensation, based on usage (a rate). Here, by contrast, the early-termination fee is fixed under the SunCom contract, and it is applicable to a defined period of service. Here it is the customer who has been charged a fixed amount that is specified in the express contract provision which addresses early-termination fees – a provision which limits the period during which the fee may be imposed. Hence all unjust enrichment claims do not necessarily involve fixing a rate, and the present case is a clear example of a context which would not involve the South Carolina courts in setting a rate.

The Commission said several times in the Sprint PCS and AT&T declaratory ruling that whether there is a contractual obligation is a matter for the state courts. "Turning to the question whether there was such an agreement here, we believe that it is an issue that should be resolved by the Court." Id. at 13198, ¶ 13. The Commission continued, citing Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket No. 96-61, Order on Reconsideration, 12 FCC Rcd 15014, 15057, ¶ 77 (1997): "We note that the [Communications Act] does not govern other issues, such as contract formation and breach of contract, that arise in a detariffed environment. As stated in the Second Report and Order, consumers may have remedies under state consumer protection and contract law as to issues regarding the legal relationship between the carrier and customer in a detariffed regime." Id. at 13198 n. 39. In the same ruling, the Commission also cited Ting v. AT&T, 182 F. Supp.2d 902, 938 (N.D. Cal. 2002) for the proposition that "state law contract claims [are] not preempted in a detariffed environment." And, the Commission held, if it were arguable that an unjust enrichment claim would set a rate (as on the facts of Sprint PCS), *even then* the Commission's practice in such situations is to "defer to the court to address this state law claim." Id. at 13198, n. 40. "We believe that the question whether the parties entered into a contract concerning such a payment obligation is not a matter of federal communications law" which makes it beyond the scope of any referral of issues to the Commission. Id. at 13192, ¶ 1.

In light of the Commission's own holdings that the state courts must rule in the first instance on whether a particular claim may be pursued consistent with the Communications Act, a declaratory ruling purporting to resolve the matter of statutory construction would be especially inappropriate.

III

ON THE MERITS, THE PREEMPTION ISSUE IS A SINGLE QUESTION OF STATUTORY INTERPRETATION: DID CONGRESS EXPRESSLY AND UNEQUIVOCALLY OUST THE PRIVATE COMMON-LAW REMEDIES PURSUED IN THE UNDERLYING LITIGATION? THE ANSWER IS, "NO."

A. The Clear and Unequivocal Test.

The legal issue which is presented in various state cases is whether 47 U.S.C. §332(c)(3)(A) clearly and unequivocally precludes the sorts of common-law civil remedies relating to a contract that the private consumer plaintiff seeks in the pending case. It does not.

Section 332(c)(3)(A) provides that state and local governments cannot prescribe who may enter the market to provide cellular service, and that states and local governments shall not prescribe service rates for cellular telephone service:

The Communications Act provision on which the cellular telephone providers rely in these cases states that :

> no state or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, ***except that this paragraph shall not prohibit a state from regulating the other terms and conditions of commercial mobile services***.

47 U.S.C. §332(c)(3)(A)(emphasis added).

Given the specific wording of the first lines of this section, as well as the highlighted "savings" provision in the statute, the assertion that this statute clearly and unequivocally abolishes the state contract law and common-law remedies of consumers under state law about the relationship between the service providers and their customers is simply and obviously wrong.

Constitutional Standard of Review. Preemption is a constitutional issue under the Supremacy Clause in Article VI, Clause 2 of the United States Constitution. The legal standard of review for resolving this issue is quite clear: Federal displacement of state law with respect to a particular topic is applied only where the plain text of a federal statutory scheme clearly ousts state law. Absent unmistakable preemption, enforcement of state-law rights is not precluded.

Thus to the extent that the Commission finds the issue fairly debatable, the remedy is to find that it is not unmistakably clear that state remedies are precluded, and thus the state claims are allowed to proceed. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). There is thus a presumption that no preemption has been effected.

The burden on a party asserting preemption to show clear statutory displacement of state law, and that has not and cannot be done in this area of communications law. That showing cannot be made in this instance.

Preemption will not lie unless it is the clear and manifest purpose of Congress. Rice, 331 U.S. at 230. Evidence of preemptive purpose *must be found in the text and structure of the statute* at issue. Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95 (1983).

In the very recent decision in Bates v. Dow Agrosciences LLC, 125 S. Ct. 1788; 161 L. Ed. 2d 687 (April 27, 2005), the Supreme Court stressed that if there are competing readings of the federal statute, one of which preempts state law claims and the other of which does not, the interpretation under which there is no preemption must be adopted:

> Even if [the regulated company] had offered us a plausible alternative reading of [the federal statute] -- we would nevertheless have a duty to accept the reading that disfavors pre-emption. "Because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action." Medtronic, 518 U.S., at 485, 135 L. Ed. 2d 700, 116 S. Ct. 2240. In areas of traditional state regulation, we assume that a federal statute

> has not supplanted state law unless Congress has made such an intention "'clear and manifest.'" New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 655, 131 L. Ed. 2d 695, 115 S. Ct. 1671 (1995) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947)); see also Medtronic, 518 U.S., at 485, 135 L. Ed. 2d 700, 116 S. Ct. 2240.

This 2005 reaffirmation of the required "canons of interpretation" by the United States Supreme Court, 125 S.Ct. at 1801, 161 L.Ed2d at 706 (emphasis added), demonstrates the current vitality of the traditional canon: unless the face of the federal state makes displacement of state-law remedies crystal clear, state-law claims should proceed. The Commission should not and cannot supply, by interpretation and policy construction, preempting language which Congress has not provided.

Section 332(c)(3)(A) by its terms expressly bars State and local Public Utility Commissions from engaging in rate regulation, or to "regulate . . . the rates charged" in the words of §332(c)(3)(A). This language in the statute clearly refers to a governmental action whose principal purpose and direct effect are to control prices. The term ordinarily refers to direct price controls of the sort that the 1993 amendments to the Communications Act authorized the Commission to terminate for wireless telephone service providers by exempting them. In the context of amendments that allow the Commission to exempt providers from its authority to "determine and prescribe" (§ 205(a)) just and reasonable charges, "regulate . . . the rates charged," it is obvious that § 332(c)(3(A)) refers to the same sort of direct price controls. Thus, §332(c)(3)(A) allows the Commission to discontinue its direct price controls and prohibits the states from imposing their own. Spielholz v. The Superior Court of Los Angeles County, 86 Cal. App. 4th 1366, 1373; 104 Cal. Rptr. 2d 197, 202 (Cal. App. 2001) (finding that “This meaning is ‘clear and manifest’," and citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 484 (1996); California v. ARC America Corp., 490 U.S. 93, 101 (1988)).

In Sprietsma v. Mercury Marine, 537 U.S. 51, 63 (2002) the Supreme Court found that in assessing preemption, a phrase providing that a state may not "regulate . . . the rates charged" uses the concept of regulation in the sense of passing laws, and refers to "positive enactments," and does not refer to "common law" obligations. This parallels the prior holding of the Court that the term "regulate" in an allegedly preempting statute did not include claims based on contract. American Airlines v. Wolens, 513 U.S. 219, 229 n. 5 (1995) ("the word series 'law, rule, regulation, standard, or other provision,' as the United States suggests, 'connotes official, government-imposed policies, not the terms of a private contract'")(emphasis added). In the airline example, the Supreme Court noted that when Congress dismantled the aviation regulatory regime, the lawmakers indicated no intention to establish, simultaneously, a new administrative process for Department of Transportation adjudication of private contract disputes. Id. at 232. Nor, the Court found, "is it plausible that Congress meant to channel into federal courts the business of resolving, pursuant to judicially fashioned federal common law, the range of contract claims relating to . . . rates . . . or services." Id. Further the "deregulatory thrust" aims not to increase preemption of state claims but rather to create "maximum reliance on competitive market forces." Morales v. TWA, 504 U.S. 374, 378 (1992). Nothing in that process implies abrogation of state contract law.

B. The Text and Legislative History of § 332(c)(3)(A) Show no Clear and Unequivocal Ouster of State Law Claims – Quite the Opposite.

In its most recent preemption decision under the Federal Communications Act the United States Supreme Court emphasized that what has become known as the "plain statement rule" applies to decisions concerning the preemptive effect, if any, of sections of the Communications Act, and it means: unless the intention to expressly abrogate state law is plainly and unequivocally expressed in the federal statute, a Communications Act provision will not be found to bar state remedies.

In Nixon v. Missouri Municipal League, 541 U.S. 125 (2004), the Court considered an ambiguous, undefined term in the Communications Act. Id. at 132 (a term "left undefined by the statute" which "can and does mean different things depending upon the setting"). In the present case the term "rates" is undefined in the statute, and is argued to mean different things depending on the context. In Nixon, as in the present context, only the most expansive reading of the contested term would outlaw application of state law. Id.

The Supreme Court of the United States held in Nixon: "What we have said already is enough to show that [the particular Communications Act section involved in that case] is hardly forthright enough to pass *Gregory*: [the statutory passage] is not limited to one reading, and neither statutory structure nor legislative history points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms. The want of any "unmistakably clear" statement to that effect, 501 U.S. 452, at 460, would be fatal to respondents' reading." Nixon, 541 U.S. at 140-41.

The "plain statement rule" invoked in Nixon and other Supreme Court preemption decisions was set forth in Gregory v. Ashcroft, 501 U.S. 452 (1991), where the Court said that under Supremacy Clause principles for Congress to displace state law in determining a subject matter "it must make its intention to do so 'unmistakably clear in the language of the statute'." Id. at 460, citing Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985) and Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99 (1984). "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States." Id. at 461, citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

The Supreme Court refers to this doctrine as the "plain statement rule." Gregory, 501 U.S. at 461. Accord Bates, 125 Sup.Ct at 1801, 161 L. Ed. 2d at 706; Nixon, 541 U.S. at 140-41. Absent unmistakable language, the argument for preemption is "fatally" flawed. Id.

Section 332, quoted previously, actually states only that "no state or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service," and even that provision is qualified *in the same sentence* by the express savings provision that "this paragraph shall not prohibit a state from regulating the other terms and conditions of commercial mobile services." 47 U.S.C. §332(c)(3)(A)(emphasis added). Simply put, there is no express provision in this section preempting state law breach of contract or unjust enrichment claims. Indeed, there is no express preemption provision in the federal law relating to any private rights of action.

In other contexts, Congress has demonstrated that it knows how to supersede state contract remedies with federal proceedings when it desires to attain that result. Section 301 of the LMRA creates federal jurisdiction over "suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organizations." 29 U.S.C. § 185(a), a provision which expressly preempts state-court contract cases. No such provision applies here. The existence of such preemption under the LMRA and under ERISA shows that Congress knows the issue with respect to state law claims, and knows full well how to preclude state claims when it wants to. No federal forum has been created for cellular telephone-related contract disputes, and no language comparable to that in the LMRA was included in the Communications Act. Indeed, the savings clauses are directly to the contrary.

When assessing a pre-emption statute "any indulgence in construction should be in favor of the States, because Congress can speak with drastic clarity whenever it chooses to assure full federal authority." Bethlehem Steel Co. v. New York State Labor Relations Bd., 330 U.S. 767, 780 (1947). The party asserting pre-emption has the burden of proving Congress' "clear and manifest" intent to pre-empt. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255 (1984). Traditional state common-law actions continue to exist unless Congress "expressly supplant[s]" them. Id. n. 28. Here, the large numbers of contract claims potentially relating to early termination fees and related contract provisions makes it implausible that Congress would have preempted those claims without so much as mentioning them.

Applying the Canons of Interpretation in the Communications Act Context. The Supreme Court has made it clear that analysis begins by "presum[ing] that Congress did not intend to pre-empt areas of traditional state regulation." Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985). See California v. ARC America Corp., 490 U.S. 93, 101 (1989) (strong presumption against pre-emption of claims traditionally governed by state law). This presumption derives from the judiciary's "respect for the separate spheres of governmental authority preserved in our federalist system." Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 522 (1981).

Thus, "consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." Maryland v. Louisiana, 451 U.S. 725, 746 (1981). Put differently, "preemption of state law by federal . . . regulation is not favored 'in the absence of persuasive reasons -- either that the nature of the regulated subject matter permits no other conclusion, or that Congress has unmistakably so ordained.'" Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981). The foregoing precepts are not mere precedential idiosyncrasies, but are deeply embedded in the "federal-state balance" that was fundamental to the constitutional plan. Hillsborough County v. Automated Medical Laboratories, 471 U.S. 707, 717 (1985); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

Thus, the Court's Supremacy Clause jurisprudence is "an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." Gregory v. Ashcroft, 501 U.S. at 461. And, it makes perfect sense to implement these principles of federalism through a presumption against preemption, since, under the Supremacy Clause, Congress retains the power to preempt when it so chooses, and it need only speak clearly to manifest its preemptive intent. Betsy J. Grey, Make Congress Speak Clearly: Federal Preemption of State Tort Remedies, 77 B.U.L. Rev. 559, 627 (1997); see also Jones, 430 U.S. at 525 (presumption against preemption "provides assurance that the 'federal-state balance' will not be disturbed unintentionally by Congress or unnecessarily by the courts") (quoting United States v. Bass, 404 U.S. 336, 349 (1971)).

The presumption against pre-emption is applicable to the garden-variety breach of contract claims asserted in litigations such as the Edwards case. See, e.g., Cipollone v. Liggett Group, Inc., 505 U.S. 504, 521-23 (1992) (common law remedy for breach of contract not preempted; only clear and express statement pre-empts traditional state claim); ARC America, 490 U.S. at 101 (state common law and statutory remedies against improper business practices not pre-empted as "area traditionally regulated by the States"); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 (1963) (state regulation preventing the deception of consumers not pre-empted).[1]

What a plurality of the Supreme Court said in Medtronic with regard to the Medical Devices Amendments of 1976 applies equally to § 332: "There is, to the best of our knowledge, nothing in the hearings, the committee reports, or the debates suggesting that any proponent of the legislation intended a sweeping pre-emption of traditional common law remedies . . . If Congress intended such a result, its failure even to hint at it is spectacularly odd." 518 U.S. at 491. Had Congress intended that § 332 deprive persons of judicial contract remedies in place since the time of American independence, one would expect Congress to have mentioned this intent somewhere in the many pages of legislative history. It did not.

The cellular service providers' argument for a construction of this federal statute to create preemption of private, common-law causes of action under § 332 makes two mistakes "fatal" under Nixon and the other Supreme Court decisions: (1) it requires that the term concept of "state" regulation, and the term "rates charged" be interpreted expansively and that they be read to encompass unmentioned private common-law rights of action in state courts, so that

[1] Section 332 should be read to alter existing law, including the availability of common law damages actions, only if there is substantial reason to believe that Congress intended that result. See, e.g., United States v. Texas, 507 U.S. 529, 534 (1993) (discussing the "longstanding . . . principle" that "statutes which invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles"); Norfolk Redevelopment and Housing Auth. v. Chesapeake & Potomac Tel. Co., 464 U.S. 30, 35-36 (1983) (common-law doctrines "'ought not to be deemed repealed, unless the language of the statute be clear and explicit for this purpose.'") (quoting Fairfax's Devisee v. Hunter's Lessee, 7 Cranch 603, 623 (1812)); Mobil Oil Corp. v. Higginbotham, 436 U.S. 618, 625 (1978) (statute must "speak directly" to abrogate common law principle). "This presumption favoring retention of existing law" is particularly appropriate where, as here, the settled law in question is state common law. United States v. Texas, 507 U.S. at 543 (citing Milwaukee v. Illinois, 451 U.S. 304, 316-17 (1981)).

these terms are broadened by interpretation to reach and interfere with private contractual relations between cellular service providers and customers, neither of which is even addressed in this Code section, and (2) the carriers' argument fails to recognize the significance of the savings provision built directly into § 332.

The first mistake is fatal to carriers' position because only if the statute is emphatically clear will preemption be found. The "canons of interpretation" were restated by the United States Supreme Court a few weeks ago, and that Court stressed that the standard of interpretation is ***the opposite*** of what the carriers need to prevail: ***it is presumed that Congress did not intend to abrogate state law claims,*** and only if the literal words of the statute make this intention of Congress "manifest" and unmistakable will preemption be found. Nixon, 541 U.S. at 140-41; Bates, 125 S.Ct. at 1801, 161 L. Ed. 2d at 706. Neither, the Commission nor the courts can read words into the federal statute to make it reach the kinds of claims pursued in the Edwards litigation. And that is what would be required, reading additional words and concepts into the statute to translate from a prohibition on state and local government regulators to private rights of action, and from "rates" for cellular telephone service to breach of contract by imposing early-termination fees after the contractual period for that term of the agreement has expired.

Amputation of the Savings Clause? The second mistake in the service providers' analysis is equally fatal: the savings clause in § 332 is a significant feature, built right into the very provision on which the carriers rely, which cannot be ignored. Indeed, it is set forth in the very same sentence of the federal Code. In its 2005 decision in Bates v. Dow Agrosciences, the Supreme Court held that it is not proper to "amputate" part of a preemption or savings clause in a federal statute, in an effort to block state common-law remedies. 125 S.Ct. at 1801, 161

L.Ed2d at 706. "That Congress added the remainder of the provision is evidence of its intent to draw a distinction between state [law] requirements that are pre-empted and those that are not." Id. That approach to preemption and savings clauses applies here.

The plain language of the Communications Act saves state law claims and permits states to regulate terms and conditions of wireless service other than rates and market entry. This includes "matters such as consumer billing information and practices," "billing disputes" and "other consumer protection matters." Russell v. Sprint Corp., 264 F. Supp. 2d 955, 961 (D. Kan. 2003). Indeed, in 2000, the Commission that state courts have authority to decide consumer fraud and breach of contract claims challenging a wireless carriers' statements and promises concerning rates. *Wireless Consumers Alliance*, 15 FCC Rcd. 17021.[2]

The plain language of § 332 excludes from its preemptive force state regulation of "the other terms and conditions" of commercial mobile service. 47 U.S.C. § 332(c)(3)(A).

[2] The FCC ruled that: "the legislative history of Section 332 clarifies that billing information, practices, and disputes – all of which might be regulated by state contract or consumer fraud laws – fall within 'other terms and conditions' which states are entitled to regulate. … [S]tate law claims stemming from state contract or consumer fraud laws governing disclosure of rates and rate practices are not generally preempted under Section 332." *Wireless Consumer Alliance* 15 FCC Rcd. at 17028-29. The FCC further found that:

> a case may present a question of whether a CMRS [*i.e.*, wireless] service had indeed been provided in accordance with the terms and conditions of a contract or in accordance with the promises included in the CMRS carrier's advertising. Such a case could present breach of contract or false advertising claims appropriately reviewable by a state court. … [A] court need not rule on the reasonableness of the CMRS carrier's charges in order to calculate compensation for the injury that was caused, even though it could be appropriate for it to take the price charged into consideration in calculating damages. … [T]he court would not be making a finding on the reasonableness of the price charged but would be examining whether under state law, there was a difference between promise and performance. … In short, we reject arguments by CMRS carriers that non-disclosure and consumer fraud claims are in fact disguised attacks on the reasonableness of the rate charged for the service. A carrier may charge whatever price it wishes and provide the level of service it wishes, as long as it does not misrepresent either the price or the quality of service. Conversely, a carrier that is charging a 'reasonable rate' for its service may still be subject to damages for a non-disclosure or false advertising claim under applicable state law if it misrepresents what those rates are or how they will apply, or if it fails to inform consumers of other material terms, conditions, or limitations on the service it is providing.

Id. at 17035 (citations omitted).

Permitting states to regulate "other terms and conditions" strongly suggests that Congress did not intend to preempt the application of state law. See Bryceland v. AT&T Corp., 122 F. Supp. 2d 703, 707 n. 3 (N.D.Tex.2000); Lewis v. Nextel Communications, 281 F. Supp.2d 1302 (S.D. Ala. 2003). It can hardly be said that the opposite conclusion is clear an unequivocal under the statute, and hence preemption is not applicable.

Congressional legislative history records demonstrate that claims like those of Ms. Edwards and the class of plaintiffs in the present case are included within the definition of "terms and conditions" left to be litigated under State law:

> Such matters as customer billing information and practices and billing disputes and other consumer protections matters, facilities siting issues (e.g. zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions".

H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 211, 261, reprinted in 1993 U.S.C.C.A.N. 378, 588. This non-exclusive list documenting the intention to preserve vast spheres of state authority, in several legal contexts, shows that Congress intended 47 U.S.C. § 332 (c) (3) (A) to preserve state law power to resolve billing practice disputes such as this. Accord: Lewis, 281 F. Supp.2d at 1306.

The Act's plain language saves state law claims and permits states to regulate terms and conditions of wireless service other than rates charged and market entry. In American law, "terms and conditions" refers to arrangements established in the parties' contract. The current edition of BLACK'S LAW DICTIONARY defines "term" as "A CONTRACTUAL STIPULATION" (8th edition, 2004 at p. 1509). "Condition" is likewise defined as a concept arising in contract and in determining liability on a contract theory. See id. at 312. According to the current DICTIONARY OF MODERN LEGAL USAGE (2nd Ed. 1995), Bryan Garner, ed., "Terms and conditions” refers to the “terms” of a contract, and the word “terms” itself is “an elliptical form of the *terms of the contract*.” Id. at 872.

Further, the legislative history is clear that Congress' intent was directed to limiting State and local Public Utility Commissions from getting into the business of licensing cellular carriers and imposing rates upon them. Congressional intent regarding the appropriate division of the regulatory authority of federal and state governments under the Communications Act is reflected by the following language introducing this section in the House of Representatives' report: "Section 332(c)(3) provides that state or local governments cannot impose rate or entry regulation on private land mobile service or commercial mobile services;" H.R. Rep. No. 103-111 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 588. This explanation of the purpose of the section now under review is the opposite of a profession of express purpose to eliminate state-law causes of action by private plaintiffs. It is ***anything but*** a clear and unequivocal statement that such private suits are preempted.

One federal court recently summarized the clear conclusion that disputes such as those in the present case are left to the state courts under the Communications Act:

> That Congress intended for States to retain some authority to regulate and hear claims concerning commercial mobile service providers is clear from § 332's statutory language and legislative history. The statutory preemption portion of §332 prohibits states from regulating "the entry of or the rate charged" by commercial mobile service providers, but limits the restriction to the topics noted, pointing out that the paragraph "shall not prohibit a State from regulating the other terms and conditions of mobile service." § 332(c)(3)(A). The statute even contemplates that states may be granted permission to regulate rates. And the legislative history supports the finding that Congress specifically intended to reserve for states the right to regulate and resolve such matters as customer billing information and practices and billing disputes and other consumer protection matters.

Moriconi v. AT&T Wireless PCS, 280 F. Supp. 2d 867, 874 (E.D. Ark. 2003)(" The statutory language, the legislative history, and the savings clause compel the conclusion that Congress envisioned that consumers would not be deprived of their state law causes of action").

As another court recently said, "The intent of Congress regarding the particular issues before us has been stated with sufficient clarity to command the almost uniform recognition of the administrative bodies and courts that have touched the issues. It is that the Communications Act should not supplant state law regarding claims that do not bear directly on rates or entry into the field of mobile telecommunication. Those rules of law that, generally, govern the relationships between parties to consumer transactions are singled out for particular preservation." Union Ink., 801 A.2d at 374.

"The FCA does not preempt all state law claims relating to telephone charges, and plaintiffs' claims in this case do not present any conflict with any filed tariffs." Indiana Bell Telephone v. Ward, 2002 U.S. Dist. LEXIS 26013 (S.D. Ind. 2002)(litigation over "termination fees" not preempted).

Second Savings Clause. The Federal Communications Act also contains an additional “savings clause” (beyond that in § 332 itself) that states:

> Nothing in this Act contained shall in anyway abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

47 U.S.C. § 414. As one federal court observed: “This 'savings clause' expressly preserves causes of action for breaches of duties that do not exist under the Act . . . . Inclusion of the savings clause clearly indicates Congress' intent that independent state law causes of action . . . not be subsumed by the Act, but remain as separate causes of action . . . .” Weinberg v. Sprint Corp., 165 F.R.D. 431, 439 (D. N.J. 1996)(internal citations omitted).

In Smith v. GTE Corp., 236 F.3d 1292 (11th Cir. 2001), the Eleventh Circuit noted that this second and overarching savings clause in the Communications Act, 47 U.S.C. § 414, contemplates the application of state law and the exercise of state-court jurisdiction. Id. at 1313. The court held that the existence of the savings clause "counsels against a conclusion that the purpose behind the [Communications Act] was to replicate the 'unique preemptive force' of the LMRA and ERISA." Id. The savings clause also applies to § 332. The Eleventh Circuit's analysis was that the savings clause evidences Congress's intent to save state-law actions, thus precluding federal preemption.

The Commission has stated that the savings clause: "Preserves the availability against interstate carriers of such preexisting state remedies as tort, breach of contract, negligence, fraud, and misrepresentation remedies generally applicable to all corporations operating in the state, not just telecommunications carriers." In re Operator Servs. Providers of Am., 6 FCC Rcd. 4475, 4477 ¶ 11 (1991); see also In the Matter of Richman Bros. Records, Inc. v. U.S. Sprint Communications Co., 10 FCC Rcd. 13639, 13641 ¶ 15 (1995) (§ 414 preserves claims against carriers as against other corporations, such as liability for misleading advertising).

And in Sprietsma v. Mercury Marine, 537 U.S. at 63, the Supreme Court cited its prior decision in Geier v. American Honda Motor Co., 529 U.S. 861 (2000), for the proposition that the "saving clause assumes that there are some significant number of common-law liability cases to save [and t]he language of the pre-emption provision permits a narrow reading that excludes common-law actions." Id., at 868. The Court concluded that such a savings provision is a logical and natural one for Congress to include:

> It would have been perfectly rational for Congress not to pre-empt common-law claims, which -- unlike most administrative and legislative regulations -- necessarily perform an important remedial role in compensating . . . victims. Cf. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984). Indeed, compensation is the manifest object of the saving clause, which focuses not on state authority to regulate, but on preserving "liability at common law or under State law." In context, this phrase

> surely refers to private damages remedies.

Id. at 64.

The language in § 414 of the Communications Act ("Nothing in this Act contained shall in anyway abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies") is to the same effect. Sprietsma also demonstrates that express preemption provisions must be interpreted *narrowly* in statutes where there are savings clauses. See Sprietsma v. Mercury Marine, 537 U.S. at 62-63 (reading express preemption provision of Federal Boat Safety Act of 1971, 46 U.S.C. 4301 narrowly not to reach common law claims in light of Act's savings clause).

The airline deregulation example is again pertinent. Looking at the savings clause in the airline deregulation statute, the Supreme Court in American Airlines held that the "conclusion that the ADA permits state-law-based court adjudication of routine breach-of-contract claims also makes sense of Congress' retention of the FAA's saving clause (preserving "the remedies now existing at common law or by statute"). The ADA's preemption clause. . . read together with the FAA's saving clause, stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated." American Airlines, Inc. v. Wolens, 513 U.S. at 232. Thus the Court noted the "distinction between what the State dictates and what the [carrier] itself undertakes" by contract as dispositive. Id. at 233.

In determining the precise scope of preemption, a key consideration is "the purposes of the pre-emption provision, and the regulatory focus of [the statute] as a whole." Fort Halifax Packing Co. v. Coyne, 482 U.S.1, 19 (1987). The central purpose of Section 332 is to prevent state or local economic regulation relating entry into the market to provide cellular service, and the fixing of rates for such service. The reasons for preventing such regulation do not, however, extend to the contractual terms agreed upon by the parties themselves. No committee or conference report, floor statement, or bill at any time suggested that all claims to effectuate contract terms would be preempted under Section 332.

Private contract claims are of a different order from governmental franchising of carriers, or state rate regulation. When the terms of a contract are purely voluntary and of the parties' own making, their enforcement will not result in the substitution of state law or policy for the carriers' business judgments about how the service should be provided or priced. "[A] common law remedy for a contractual commitment voluntarily undertaken should not be regarded as a 'requirement . . . imposed under State law.'" Cipollone v. Liggett Group, Inc., 505 U.S. at 526. Where a State affords a common-law remedy for breach of such a commitment, "the level of choice that a defendant retains in shaping its own behavior distinguishes the indirect regulatory effect of the common law from positive enactments such as statutes and administrative regulations." Id. at 519 (Blackmun, J., joined by Kennedy & Souter, JJ., concurring in part, concurring in the judgment in part, and dissenting in part). The common law of contract may thus be applied by that state courts consistent with Section 332.

The conclusion that §332 of the Act does not preempt state-law contract claims is further reinforced by the consequences of a contrary construction. Three equally untenable results are possible.

One possibility is that the FCC would be solely responsible for adjudicating all complaints of breach of contract. The Act did not, however, create any administrative apparatus for adjudication of private contract disputes. Even assuming that the Commission has the power to create such a mechanism, to do so would be contrary to the Acts basic deregulatory thrust. Through deregulation, Congress sought to place less reliance on regulatory decisions in favor of a market mechanism operating by way of private decisions. It is inconceivable that Congress intended routine breach-of-contract cases to be preempted in favor of a federal administrative regime to resolve all contract-based claims by customers against cellular service providers.

A second possible, but equally untenable, result of preemption of all contract claims is wholesale elimination of the enforceability of contracts in any forum. Under such an interpretation, federal preemption would simply render null and void -- or at least unenforceable -- any contract touching on cellular service. Such a principle would invalidate customers' claims. Such a result could not be squared with a statute designed to place maximum reliance on market forces, which ordinarily could not operate absent a mechanism by which parties may be held accountable for their contracts. The stability and efficiency of the market depend fundamentally on the enforceability of agreements freely made, based on needs perceived by the contracting parties at the time. The absence of any indication in the legislative history that Congress intended to eliminate all common-law contract remedies makes this alternative particularly implausible. "It is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured," see Silkwood, 464 U.S. at 251, by breaches of contract.

A third possible outcome would be to shift contract claims relating to contract provisions in cellular telephone service arrangements to the federal courts, to be resolved under a judicially fashioned federal common law. That result, which would redirect potentially countless minor contract disputes into federal court, is also unsupported by the

Act. There is no indication in the text, history or purpose that Congress believed that adjudication of such claims under state common law was anti-competitive or burdensomely non-uniform, and that the courts should instead fashion federal common law applicable to cellular telephone-related contract claims.

C. Case Law and the Commission's Past Rulings Confirm that There is No Clear and Manifest Abolition of State Law Rights and Claims in § 332(c)(3)(A).

Other courts and the Commission itself have carefully considered the statute and have found that adjudication of state law contract claims relating to early-termination fees is not rate regulation foreclosed by federal law. Perhaps the most recent and thorough of these surveys is that conducted by Judge Gritzner in Phillips v. AT&T Wireless, 2004 U.S. Dist. LEXIS 14544 (July 29, 2004)("Phillips"). In discussing "[t]he meaning of 'rates' under the FCA" the court in Phillips noted the prevailing understanding that "Congress did not preempt all claims that would influence rates, but only those that involve the reasonableness or lawfulness of the rates themselves." Id., citing Brown v. Washington/Baltimore Cellular, Inc., 109 F. Supp. 2d 421, 423 (D. Md. 2000).

The court in Phillips noted that the Commission has been careful to rule that that not all matters affecting wireless providers' rates are preempted rate regulation under the Act. For example, the Commission has observed that state law claims relating to the "disclosure of rates and rate practices are not generally preempted under Section 332."[3] Thus the court in Phillips, in accord with other decisions, rejected the arguments that "anything that might touch upon [a

[3] Phillips, citing Southwestern Bell at ¶ 23.

wireless provider's] business" is a challenge to rates in the sense that an adverse ruling would increase "business expenses" that "would likely be passed on to customers as rate increases."[4]

Adopting the view of several other courts, the judge in Phillips quoted the following observation about the overly broad reading of the term "rates" sought by the cellular service company:

> US Cellular would have this Court construe "rates" so broadly as to incorporate anything that might touch upon U.S. Cellular's business. US Cellular's interpretation requires numerous degrees of separation in order for a state claim to escape preemption by the Communications Act. This is problematic. Inherently, any interference with U.S. Cellular's business practices will increase its business expenses. These increased business expenses would likely be passed on to customers as rate increases. If "rate" included any action that indirectly induced rate increases, the exception would be swallowed by the rule. This could not have been Congress' intent. US Cellular's interpretation would destroy the Act's savings clause, making all actions affecting the company

Phillips, 2004 U.S. Dist. LEXIS 14544, *31, quoting U.S. Cellular, 2000 U.S. Dist. LEXIS 21656, 2000 WL 33915909, at *5.

The court concluded that "early termination fees are not rates but rather are other terms and conditions, and Congress demonstrated a specific intent to exclude "other terms and conditions" from preemption under section 332." Phillips at *36-*37:

> [T]he Court finds the AT&T early termination fee is not a "rate". Both Judge Pratt and Judge Melloy have rejected this same argument, finding that such a broad interpretation of "rates" is contrary to the intent of Congress. This Court agrees that "rate" must be narrowly defined or there is no ability to draw a line between economic elements of the rate structure and normal costs of operating a telecommunications business that have no greater significance than as factors to be considered in determining what will ultimately be required of rates to provide a reasonable return on the business investment. Judge Pratt gave a reasoned analysis in determining an early termination fee was not a "rate" under the FCA, and Defendant has not persuaded the Court to find otherwise.

[4] Phillips, citing: U.S. Cellular, 2000 U.S. Dist. LEXIS 21656, 2000 WL 33915909, at *5; Cedar Rapids Cellular, 2000 U.S. Dist. LEXIS 22624, 2000 WL 34030836, at *7; see also In re Wireless Consumers Alliance, Inc., 15 FCC Rcd. 17021, at 9, 14-15 (rejecting notion that any determination of money damages against a wireless provider is necessarily equivalent to rate regulation). Indeed, "if 'rate' included any action that indirectly induced rate increases, the exception would be swallowed by the rule." U.S. Cellular, 2000 U.S. Dist. LEXIS 21656, 2000 WL 33915909, at *5; see also Brown, 109 F. Supp. 2d at 423 ("Congress did not preempt all claims that would influence rates, but only those that involve the reasonableness or lawfulness of the rates themselves.").

> Accordingly, Plaintiff's claims are not completely preempted by section 332 of the FCA because neither constitute direct challenges to "rates" as defined herein.

See also: Iowa v. United States Cellular Corp., 2000 U.S. Dist. LEXIS 21656, 2000 WL 33915909 (S.D. Iowa Aug. 7, 2000); Cedar Rapids Cellular Tel., L.P. v. Miller, 2000 U.S. Dist. LEXIS 22624(N.D. Iowa 2000)("like the Southern District, this Court declines to read 'rates' in section 332 so broadly as to necessarily preclude a state's judicial challenge based on a statute to protect consumers against fraudulent or deceptive business practice."); Cellco P'ship v. Hatch, 2004 U.S. Dist. LEXIS 18464 (D. Minn. 2004).

Accord: Esquivel v. Southwestern Bell Mobile Sys., Inc., 920 F.Supp. 713, 715-16 (S.D. Tex. 1996)(a state law challenge to cancellation fees such as those charged by SunCom is not barred by federal law).[5] See also Bryceland v. AT&T Corp., 122 F. Supp. 2d 703, 707 n. 3 (N.D.Tex.2000); Lewis v. Nextel Communications, 281 F. Supp. 2d 1302 (S.D. Ala. 2003); Iberia Credit Bureau Inc. v. Cingular Wireless LLC, 379 F.3d 159 (5th Cir. 2004)(arbitration clause is a “term or condition” of the contract, subject to enforcement and adjudication by the courts in a civil action). See generally Brown v. MCI Worldcom Network Services, 277 F.3d 1166 (9th Cir. 2004)(validity of the imposition of a $10 “fee” was not a contest over rates, and thus private civil action could go forward).

The Commission itself considered the issue of whether § 332 generally preempts state courts from awarding monetary relief in *Wireless Consumers Alliance*. There the Commission noted its prior finding that the language and legislative history of §332 did not support "the preemption of state contract or consumer fraud laws relating to the disclosure of rates and rate practices." 15 FCC Rcd. at 17028. The FCC went a step further, finding that the same statutory

[5] Compare GTE Mobilenet of Ohio v. Johnson, 111 F.3d 469, 478 (6th Cir 1997)(the limitation on state regulation is clearly intended to prohibit setting of rates, regulation of rates and adjustment of rates by the state).

language and legislative history did not, as a general matter, prevent state courts from awarding damages to customers of commercial mobile radio service providers based on violations of state contract or consumer fraud laws. Id. at 17029. Accord: Moriconi, 280 F.Supp.2d at 876.

The Commission specifically rejected the argument of the carriers that consumer claims, including claims for return of improper charges collected, were in fact disguised attacks on the reasonableness of the rate charged for the service, stating:

> A carrier may charge whatever price it wishes and provide the level of service it wishes, as long as it does not misrepresent either the price or the quality of service. Conversely, a carrier that is charging a "reasonable rate" for its services may still be subject to damages for a non-disclosure or false advertising claim under applicable state law if it misrepresents what those rates are or how they will apply, or if it fails to inform consumers of other reasonable terms, conditions, or limitations on the service it is providing. We thus do not agree with those commenters who allege that, for consumer protection claims, any damage award or damage calculation, including any refund or rebate, is necessarily a ruling on the reasonableness of the price or the functional equivalent of a retroactive rate adjustment.

Wireless Consumers Alliance, 15 FCC Rcd. at 17035-36 (emphasis added).

Interruption of the present case to ask the FCC's views is unnecessary for the further reason that the FCC itself has already ruled that consumer claims, including claims for return of improper charges collected, are not in legal effect some sort of disguised attacks on the reasonableness of the rate charged for the service.

A federal court expressly noted that in *Wireless Consumers Alliance* "the FCC was considering the preemption issue in the defensive posture, that is, the argument of mobile service providers that an award of damages to plaintiffs who prevailed in their state consumer protection, tort, or contract laws was preempted by § 332." Moriconi, 280 F.Supp.2d at 877 and n. 3. That, of course, is the hope of the carriers here as well.

In sum, the resolution of the Edwards case under South Carolina law would have no material effect on federal regulation of the telecommunications industry or SunCom as the particular carrier involved in that litigation. A judgment in favor of plaintiffs in a case like Edwards would require the defendant to do what it is already legally required to do under its written contract and the law, and the judgment will not impose inconsistent obligations upon the carrier. As one federal court commented with respect to the non-preemption of litigation concerning termination fees, "To the extent that resolution of this case would affect federal regulation of the telecommunications industry or tariff rates, such an effect would be merely incidental." Indiana Bell Telephone Co. v. Ward, 2002 U.S. Dist. LEXIS 26013 (S.D. Ind. 2002), citing Nader v. Allegheny Airlines, 426 U.S. 290, 300 (1976) (finding that any impact on rates resulting from tort liability or from practices adopted to avoid such liability would be incidental). Because resolution of the claims before the court will not affect federal regulation of telecommunication carriers, plaintiffs' claims are not preempted by the Communications Act. And another state's court has determined that §332 did not preempt comparable state claims. See Union Ink Co. v. AT & T Wireless, Inc., 801 A.2d 361 (N.J. Super. Ct. App. Div. 2002).

As noted above, the argument that the amount of a carrier's "early termination fee" should be considered part of its "rates" because it needs to recoup up-front costs by compelling customers to retain their service agreements through the agreed period is inapplicable to claims such as those raised in the Edwards lawsuit: in that case the Complaint does not challenge the rates that SunCom charges, or its right to insist on a termination fee for early-cancellation of its agreements. The Edwards Complaint only challenges the wrongful manner in which it imposes termination charges late in the parties' ongoing relationship, with no basis in the contract and in violation of the express terms of the contracts it entered with customers. In *Wireless Consumers Alliance*, the Commission specifically ruled that such state law challenges were not challenges to rates themselves, but, rather, were consumer fraud and breach of contract challenges completely permissible under the Communications Act. 15 FCC Rcd. at 17035.

A case cited by CTIA on the issue whether "ETFs" deals with telephone "rates" is Gilmore v. Southwestern Bell, 156 F. Supp. 2d 916 (N.D. Ill. 2001). But the pleading in Gilmore alleged that the company changed impermissible per-minute rates for service: "Plaintiff alleges that he has been a cellular telephone customer of defendant since before 1995. He further alleges that he has a contract under which he agrees to pay certain rates for his cellular telephone service. 'Nowhere in the Contract or elsewhere did Plaintiff agree to pay higher rates for cellular service or to pay additional fees for which no significant additional goods or services were rendered'." Id. at 919. The court summarized the claim "in effect" as alleging that the plaintiffs had been deceived "into paying for cellular service at rates higher than the rates for which they contracted." Id.

Bastien v. AT&T Wireless Servs., Inc., 205 F.3d 983, 986-87 (7th Cir. 2000), also cited by the carriers, preceded the FCC's clarification noted about that the States retain the ability to regulate wireless' carriers' billing practices, even those related to rates. Moreover, Bastien, unlike Edwards, involved direct challenge to AT&T's right to enter the Chicago-area wireless service market and the propriety of its rates in light of the poor service it provided. Bastien, 205 F.3d at 989. The Seventh Circuit found preemption because the plaintiff's claims would "directly alter the federal regulation of tower construction, location and coverage, quality of service and hence rates for service." The Seventh Circuit distinguished the claims in Bastien from challenges to a wireless carriers' fraudulent and deceitful billing and other practices, which clearly are not preempted by the Communications Act. Id. at 988-89 (citing In re Long Distance Telecommunications Litig., 831 F.2d 627, 633-34 (6th Cir. 1987)).

Recently the federal Seventh Circuit revisited Bastien and the preemption of contract claims against cellular telephone providers. Recognizing that several other federal courts had carefully distinguished between cases where the state law lawsuit challenged market entry or time charges from other contract or tort actions, the court held in Fedor v. Cingular Wireless Corp, 355 F.3d 1069, 1072-1074 (7th Cir. 2004) that state law contract actions for failure of the company to impose the proper charges are not preempted.

> In other words, these claims address not the rates themselves, but the conduct of Cingular in failing to adhere to those rates. That is precisely the type of state law contract and tort claims that are preserved for the states under § 332 as the "terms and conditions" of commercial mobile services.

To any extent that Bastien survives Fedor, it is clearly inapplicable or superseded where the lawsuit involves early-termination fees. And Gilmore, a trial-level decision in the Seventh Circuit, is displaced entirely by Fedor, an appellate decision from that Circuit. See Phillips, at n. 10 citing other authority for the same proposition. Accordingly, the preemption doctrine does not support the carriers' motion for declaratory relief from the continued litigation of these matters before the present Court.

D. Even if Early Termination Fees Were "Rates" Under Federal Law, Claims in Cases Like Edwards Would Go Forward Because Consumers Remain Free to Challenge Billing and Account Practices as to Rates.

The Commission has already ruled that state courts have authority to decide consumer fraud and breach of contract claims challenging a wireless carriers' statements and promises concerning rates. *In re Wireless Consumer Alliance, Inc.*, 15 FCC Rec. 17021. Thus, even if the remote sort of claim here, which deals with termination fees imposed after a contractual period where they were authorized expired, was viewed – contrary to the Commission's own prior findings – as a “retroactive rate adjustment,” claims about improper billing and disputes about the imposition – even of posted rates – are held permissible under federal law. See Fedor, 355 F.3d at 1072-74.

Thus, even if contract termination fees were “rates,” the Edwards action nonetheless should proceed, because the essence of the claim is that the carrier did not adhere to the terms of the contract concerning “early” termination fees – and imposed such fees after the initial 12-month period was past. This is a “terms and conditions” issue under contract and consumer law preserved for state-law resolution.

This recognition of the validity of state law claims in state courts is consistent with the Congressional purpose in shaping the telecommunications statutes. The House Report accompanying the 1993 Act expressly stated that “Such matters as customer billing information and practices and billing disputes and other consumer protections matters. . . fall within a state's lawful authority. This list is intended to be illustrative only and not meant to preclude other matters generally understood to fall under "terms and conditions." H.R.Rep. No. 103-111, 103d Cong., 1st Sess. 211, 261, reprinted in 1993 U.S.C.C.A.N. 378, 588.

As a state court said a few months ago in rejecting a claim that federal law precluded private claims in this area, "The intent of Congress regarding the particular issues before us has been stated with sufficient clarity to command the almost uniform recognition of the administrative bodies and courts that have touched the issues. It is that the Communications Act should not supplant state law regarding claims that do not bear directly on rates or entry into the field of mobile telecommunication. Those rules of law that, generally, govern the relationships between parties to consumer transactions are singled out for particular preservation." Union Ink Co., 801 A.2d at 374.

In an analogous context the Commission has ruled that the state law of contracts should be enforced in common law litigation over "access" charges levied upon non-incumbent carriers. See In the Matter of Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges, 17 FCC Rcd. 13192, at 13193-95 (2002). In that proceeding the Commission held that where a telephone company is permitted to collect a non-usage or rate-based fee "only to the extent that a contract imposes a payment obligation" (Id. at 13198 ¶ 12) the Commission would provide comments on the applicable federal communications law aspects, but the Commission has refused to opine on the contract law issues. The Commission held: "Because the existence of a contract is a matter to be decided under state law, we defer to the court to answer this question." Id. at 13198 ¶ 13.

The Commission concluded: "Until the court determines the respective obligations of the parties, in particular whether [one party] has any obligation to pay [the telephone service provider] under a contract, the Commission has no basis on which to assess whether [a party] is subject to sections 201(b) or 202(a) in these circumstances and, if so, whether its actions violate those statutory provisions." Id. at 13200 ¶ 18. AT&T appealed the Access Charges Declaratory Ruling, arguing that "the Declaratory Ruling is contrary to law, because, in allegedly allowing a state court to determine whether it owes access charges under an implied contract or quantum meruit." The D.C. Circuit refused to disturb the Commission's rulings, and characterized the Commission's ruling as a direct holding that "state courts may determine whether the parties have in place a contract that fixes access charges." AT&T Corp. v. FCC, 349 F.3d at 701. The propriety of collecting such ancillary charges was held to be a matter of contract, including obligations under implied contractual doctrines. Id., 349 F.3d at 701. Dealing with the analogous area of access charges, the Court described the Commission's third holding in the

Access Charges Declaratory Ruling as follows: "access charges may be established by an express contract or an implied-in-fact contract in which the price was already fixed (such that the state court would not inquire into the reasonableness of the rate)." Id.

In so ruling the D.C. Circuit relied on the holding of *Wireless Consumers Alliance* that §332 does not generally preempt state courts from awarding monetary damages for breach of contract. Id. at 17040. Rather, the Commission stated that "whether a specific damage award or damage calculation is prohibited by Section 332 will depend on the specific details of the award and the facts and circumstances of the case," and noted that "a consideration of the price originally charged, for the purposes of determining the extent of the harm or injury involved, is not necessarily an inquiry into the reasonableness of the original price and therefore is permissible." Id. at 17041.

In the present context, since the early-termination fee is already fixed it – like the contractual matters referred to by the Commission and the D.C. Circuit in the Access Charges Declaratory Ruling – would not involve the courts in setting a charge, or assessing its reasonableness. Rather, only adjudicating obligations under pre-existing contract terms would be required.

Given that the present case will proceed even if an early-termination fee in the parties' contract were a "rate" for telephone service, a diversion into the administrative forum, with the attendant cost and delay that inhere in any such proceeding (many of the FCC's dockets are open and active for several years) is unwarranted. Whether termination fee disputes involve "rates" for telephone service, or not, the present claims are proper.

Airline Deregulation Analogy. In American Airlines v. Wolens the U.S. Supreme Court dealt with the Airline Deregulation Act of 1978 (ADA), 49 U.S.C. App. § 1305(a)(1), which prohibits States from "enacting or enforcing any law . . . or other provision having the force and effect of law relating to [air carrier] rates, routes, or services." The private plaintiffs in that case argued that American Airlines changed a contractual "frequent flyer program" by devaluing credits previously earned by travelers. The class-action plaintiffs sought dollar damage recovery on theories of breach of contract, and consumer fraud under a state statute. 513 U.S. at 225. The Court held that while claims under a "prescriptive" state statute, which controlled "the primary conduct of those falling within its governance" was preempted under the Act, the federal statute does not bar court adjudication of breach of contract claims. The Court found that the preemption clause left room for suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's breach of its own, self-imposed undertakings. Moreover, the Court agreed with the position of the United States that terms and conditions airlines offer and passengers accept are privately ordered obligations and thus do not fit within the compass of state enactments and directives targeted by the federal preemption:

> We do not read the ADA's preemption clause, however, to shelter airlines from suits alleging no violation of state-imposed obligations, but <u>seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings</u>. As persuasively argued by the United States, <u>terms and conditions airlines offer and passengers accept are privately ordered obligations</u> "and thus do not amount to a State's 'enactment or enforcement [of] any law, rule, regulation, standard, or other provision having the force and effect of law' within the meaning of [§] 1305(a)(1)." Cf. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 526 (1992) (plurality opinion) ("[A] common-law remedy for a contractual commitment voluntarily undertaken should not be regarded as a 'requirement . . . imposed under State law' within the meaning of [Federal Cigarette Labeling and Advertising Act] § 5(b)."). A remedy confined to a contract's terms simply holds parties to their agreements -- in this instance, to business judgments an airline made public about its rates and services.

Id. at 228-29 (emphasis added).

Thus the Court found that a remedy confined to a contract's terms simply holds parties to their agreements -- in this instance, to business judgments an airline made public about its rates and services. The Court also found that court enforcement of private agreements advances the market efficiency that the deregulation statute was designed to promote, and comports with provisions of the Federal Aviation Act and related Department of Transportation (DOT) regulations that presuppose the vitality of contracts governing air carrier transportation.

Finally, the Supreme Court found that enforcement of private contract claims is responsive to the reality that the federal agency involved lacks the apparatus and resources required to superintend a contract dispute resolution regime. Court adjudication of routine breach-of-contract claims, furthermore, accorded due recognition to Congress' retention of the FAA's saving clause, which preserves "the remedies now existing at common law or by statute." Nor can it be maintained that plaintiffs' breach-of-contract claims are identical to, and therefore should be preempted to the same extent as, their Consumer Fraud Act claims. The basis for a contract action is the parties' agreement; to succeed under the state Act, one need not show an agreement, but must show an unfair or deceptive practice. The Court stated:

> Market efficiency requires effective means to enforce private agreements. See Farber, Contract Law and Modern Economic Theory, 78 Nw. U. L. Rev. 303, 315 (1983) (remedy for breach of contract "is necessary in order to ensure economic efficiency"); R. Posner, Economic Analysis of Law 90-91 (4th ed. 1992) (legal enforcement of contracts is more efficient than a purely voluntary system). As stated by the [brief of the Solicitor General on behalf of the] United States: "The stability and efficiency of the market depend fundamentally on the enforcement of agreements freely made, based on needs perceived by the contracting parties at the time."

Id. at 230. Thus, the Court held, id. at 222:

> We hold that the ADA's preemption prescription bars state-imposed regulation of air carriers, but allows room for court enforcement of contract terms set by the parties themselves.

Conclusion

The declaratory proceedings turn on whether the Congressional enactment which – in a single, one-sentence section – states that state and local governments are not permitted to control entry into the cellular service market, or to set the rates for those companies which do so, and yet preserves a broad and non-exclusive listing of areas where the governmental bodies are free to regulate, somehow sub silentio abrogated common law rights of action by private consumers about written contracts.

There is a strong presumption against preemption of state law, especially in the area of local telephone service where, until the passage of the Telecommunications Act of 1996 the states had historically exercised an exclusive jurisdiction. See Medtronic, 518 U.S. at 485-86; Louisiana Pub. Serv. Comm'n v. F.C.C., 476 U.S. 355 (1986).

Moreover, consumer remedies traditionally represent a field regulated by the states. Cliff v. Payco General American Credits, 363 F.3d 1113, 1125 (11th Cir. 2004); Florida Lime & Avocado Growers, 373 U.S. at 135. The Supreme Court "has recently reaffirmed that there is a presumption against finding implied preemption of state law in these fields. Cliff, 363 F.3d at 1125-26, citing Medtronic, 518 U.S. at 485; Cipollone v. Liggett Group, 505 U.S. at 518 (referring to the "presumption against the preemption of state police power regulations"); see also Fla. East Coast Ry. Co. v. City of West Palm Beach, 266 F.3d 1324, 1328 (11th Cir. 2001). Recently a court elsewhere summarized the landscape: there is "overwhelming authority" declining to find that the Communications Act is preemptive. Moriconi, 280 F.Supp.2d at 875.

Under the Supreme Court's very recent Bates decision on preemption standards, and its decision last year construing an undefined term of the Communications Act, it is clear that one cannot reasonably conclude that Congress clearly and unequivocally ousted state law claims relating to termination provisions of consumer service contracts. Hence the Commission should find and declare that there is no preemption of state claims, which are permitted to go ahead.

Alternatively, the Commission should require, in accord with its prior holdings, that these issues be decided by the courts where the underlying actions are pending.

The Commission has set up two separate declaratory ruling dockets, segregating into Docket No. 05-194 the consideration of private litigations attacking early-termination fees on grounds of reasonableness, violation of doctrines restricting penalties, liquidated damages provisions, or adhesion contracts from the issues, and establishing Docket No. 05-193 to consider any declaratory rulings appropriate in the case of a particular state litigation which does ***not*** challenge the freedom of cellular service providers to specify an early termination period, to fix the amount of an early-termination fee, use early-termination fees in structuring their relationships with customers and planning their business offerings, etc. Rather, Docket No. 05-193 raises the much narrower question whether private state law claims concerning the imposition of charges inconsistent with the specified contract provision may be heard in state court. These billing-type disputes, at least as pled in the state litigation underlying Docket No. 05-193, do not amount to rate regulation even if the early-termination charge were viewed as a rate.

The preemption provision in § 332 describes activities most naturally associated with the exercise of state power (franchising approved carriers and engaging in state utility regulation as in decades past), not with the resolution of private contract disputes. It is thus best read not to displace (or to prevent the effectuation of) competitive, market-driven choices embodied in private contracts. To the extent that common-law claims for breach of contract are based on allegations of an agreement actually entered into by the carrier and a customer, as distinguished from state laws or policies external to any agreement, the statutes leave those claims intact. Effectuating private contracts also is consistent with the Act's deregulatory purpose, because contracts do not substitute state policy decisions for the telephone service companies' business judgments, but are rather a key component of the deregulated market that the amended Act was designed to encourage.

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SOUTH CAROLINA COURT OF COMMON PLEAS, FIFTEENTH JUDICIAL CIRCUIT (COUNTY OF HORRY) CASE NO. 02-CP-26-3539